APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 1999 Decided December 17, 1999

No. 98-7209

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL., APPELLANTS

v.

DISTRICT OF COLUMBIA, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 96cv00569)

Before: EDWARDS, *Chief Judge*, WILLIAMS and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

Separate opinion filed by *Circuit Judge* WILLIAMS concurring in the judgment.

EDWARDS, *Chief Judge*: In 1961, District Intown Limited Properties Partnership ("District Intown") purchased Cathedral Mansions South, an apartment building and landscaped lawn on Connecticut Avenue across from the National Zoo. District Intown subdivided this property into nine contiguous lots in 1988. In March 1989, all nine lots were declared historic landmarks. In July 1992, the Mayor of the District of Columbia denied District Intown's request for construction permits to build eight townhouses on eight of the nine lots, finding that the construction was incompatible

with the property's landmark status. Alleging that the District of Columbia's denial constituted a taking, District Intown and its general partners sued under 42 U.S.C. § 1983 (1994) for just compensation under the Takings Clause of the Fifth Amendment.

Upon cross motions for summary judgment, the District Court granted summary judgment for the District of Columbia. *See District Intown Properties Ltd. Partnership v. District of Columbia*, 23 F. Supp. 2d 30 (D.D.C. 1998). The District Court held that the relevant parcel for the purposes of determining whether a taking had occurred consisted of the entire property, including the apartment building, not the eight individual lots that District Intown sought to develop. *See id.* at 35-36. The court then analyzed the alleged taking under the Supreme Court's holdings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The District Court found that there was no categorical taking under *Lucas*, because District Intown had not been deprived of all economic value in the relevant parcel. The trial court further held that District Intown could not make out a claim under *Penn Central*, because its reasonable investment-backed expectations had not been disappointed and it continued to receive economic benefits from the property.

We hold that the District Court correctly found that the relevant parcel for the takings analysis consisted of the entire property held by District Intown, *i.e.*, the property as it was originally purchased in 1961 and as it was held for 27 years prior to the 1988 subdivision. All relevant objective and subjective factors support this conclusion. When the property is viewed as a single parcel, there is no doubt that it has not been rendered valueless. Indeed, even if each subdivided parcel is considered separately, District Intown has not shown a "total taking" under *Lucas*. In addition, the record here does not show that District Intown's investment-backed

expectations were disappointed. This is not surprising, because District Intown could not have had any reasonable investment-backed expectations of development given the background regulatory structure at the time of subdivision. Accordingly, we hold that District Intown did not present any genuine issue of material fact in support of a takings claim under *Penn Central* or *Lucas*. We therefore affirm the District Court's judgment.

I. BACKGROUND

In 1961, District Intown purchased in fee simple Lot 1 of Subdivision Square 2106 on Connecticut Avenue, across from the National Zoo. The property was known as Cathedral Mansions South and consisted of an apartment building and adjacent landscaped lawns. District Intown made no significant changes to the property until 1988, when it subdivided Cathedral Mansions South into nine lots, designated as Lots 106 through 114. The subdivisions were recorded on June 30, 1988. Lot 106 contains the apartment building, and Lots 107 through 114 are each portions of the landscaped lawn. The record indicates that District Intown spent $2,819 to survey the parcel and to record the subdivision. The record does not reflect any other expenses.

On December 30, 1988, District Intown applied for permits to build one townhouse on each of the eight landscaped lots. The zoning and structural engineering divisions of the Department of Consumer and Regulatory Affairs approved the permits on March 7, 1989. However, because the property is located across from the National Zoo, the permits were referred to the Commission on Fine Arts. *See* D.C. Code Ann. § 5-410 (1994) ("Shipstead-Luce Act"). The Shipstead-Luce Act, in effect since the 1930s, empowers the Commission on Fine Arts to communicate to the Mayor "recommendations, including such changes, if any, as in its judgment are necessary to prevent reasonably avoidable impairment of the public values belonging" to various

buildings and parks. *Id.* On March 31, 1989, the Commission on Fine Arts recommended against construction.

Beginning in 1987, before the property was subdivided, a movement developed in the Woodley Park community in support of designating the property a historic landmark. This culminated on March 2, 1989, when the group filed a landmark designation petition. This was five days before District Intown received zoning approval for the construction. The Historic Preservation Review Board ("Review Board") approved the landmark designation on May 17, 1989. Because the landmark designation petition was pending when District Intown's permits were approved for zoning, the permits were referred to the Review Board pursuant to the District of Columbia's landmark laws, *see* D.C. Code Ann. § 5-1001 *et seq.* (1994 & Supp. 1999), effective since 1979. On July 19, 1989, the Review Board recommended that the construction permits be denied. The permit applications were dismissed without prejudice on December 20, 1991.

On January 31, 1992, District Intown filed new permit applications identical in all respects to those previously dismissed. The permits were again referred to the Review Board, which recommended denial because construction on the lawn would be incompatible with its historic landmark status. Pursuant to D.C. Code Ann. § 5-1007(e), District Intown requested a hearing before an agent designated by the Mayor. The hearing was held on July 22 and 24, 1992. The Mayor's agent agreed with the Review Board, stating that "any construction destroying the lawn" would be incompatible with its landmark status. Decision and Order of Mayor's Agent ¶ 61 n.1, *reprinted in* Joint Appendix ("J.A.") 368. In addition, the agent purported to hold that the denial of the construction permits did not work an economic hardship or constitute a taking, but the District of Columbia Court of Appeals has since declared that the agent's holding was outside his jurisdiction. *See District Intown Properties, Ltd. v. Department of Consumer and Regulatory Affairs*, 680

A.2d 1373, 1379 (D.C. 1996) (decision of the Mayor's agent regarding alleged economic hardship would have no preclusive effect in any future proceeding in which District Intown might claim an uncompensated taking).

Thereafter, on March 22, 1996, District Intown filed this § 1983 action. On cross motions for summary judgment, the District Court entered summary judgment for the District of Columbia on September 25, 1998. *See District Intown Properties Ltd. Partnership*, 23 F. Supp. 2d at 39. The court found that the property (*i.e.*, the "relevant parcel") for the purposes of assessing whether a taking had occurred consisted of the original Lot 1 prior to its subdivision into nine lots. *See id.* at 35-36. Because District Intown continued to receive significant economic benefits from use of the relevant parcel, the court found that appellants failed to demonstrate that their property had been rendered "valueless," and their claim to a taking under *Lucas* failed. *See id.* at 36-37. The court then turned to the *ad hoc* analysis elucidated by *Penn Central* and found that none of the *ad hoc* factors support District Intown's takings claim. *See id.* at 37-39. This appeal followed.

II. ANALYSIS

A. *Standard of Review*

This court reviews a grant of summary judgment *de novo*. *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc). A party is entitled to summary judgment if the record reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed R. Civ. P. 56(c). In deciding whether there is a genuine issue of material fact, the court must assume the truth of all statements proffered by the non-movant except for conclusory allegations lacking any factual basis in the record. *See Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). Summary judgment may be granted even if the movant has proffered no evidence, so

long as the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As the "party challenging governmental action as an unconstitutional taking," District Intown bears a "substantial burden." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998).

B. *The Takings Analysis*

The Takings Clause of the Fifth Amendment prohibits the government from taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. In a regulatory takings case, the principal focus of inquiry is whether a regulation "reaches a certain magnitude" in depriving an owner of the use of property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *see also id.* at 415 (asking whether the regulation "goes too far"). The Supreme Court has indicated that most regulatory takings cases should be considered on an *ad hoc* basis, with three primary factors weighing in the balance: the regulation's economic impact on the claimant, the regulation's interference with the claimant's reasonable investment-backed expectations, and the character of the government action. *See Penn Central Transp. Co.*, 438 U.S. at 124.

The meaning of the three factors identified in *Penn Central* has been amplified by the Court, both in *Penn Central* and in later cases. The *regulation's economic effect* upon the claimant may be measured in several different ways. *See Hodel v. Irving*, 481 U.S. 704, 714 (1987) (looking to the market value of a property); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495-96 (1987) (looking to whether the regulation makes property owner's coal operation "commercially impracticable"); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (looking to the possibility of other economic use besides sale, which was prohibited by the chal-

lenged regulation); *Penn Central Transp. Co.*, 438 U.S. at 136 (focusing on the ability to earn a reasonable rate of return). A *reasonable investment-backed expectation* "must be more than a 'unilateral expectation or an abstract need.' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Claimants cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Penn Central Transp. Co.*, 438 U.S. at 130. And the *character of the governmental action* depends both on whether the government has legitimized a physical occupation of the property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982), and whether the regulation has a legitimate public purpose, *see Keystone Bituminous Coal Ass'n*, 480 U.S. at 485. Finally, under all three of these factors, the effect of the regulation must be measured on the "parcel as a whole." *See Penn Central Transp. Co.*, 438 U.S. at 130-31.

The Supreme Court has indicated that it will find a "categorical" or *per se* taking in two circumstances. The first circumstance includes regulations that result in "permanent physical occupation of property." *Loretto*, 458 U.S. at 434-35. This circumstance is not at issue in this case. The second circumstance includes regulations pursuant to which the government denies *all* economically beneficial or productive use of property. *See Lucas*, 505 U.S. at 1015. This so-called "total taking" claim is at the heart of District Intown's complaint here. Unfortunately, the facial simplicity of the "total taking" standard belies the difficulty in its application. As the Court acknowledged in *Lucas*, its "rhetorical force . . . is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." 505 U.S. at 1016 n.7.

Under both *Lucas* and *Penn Central*, then, we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel. In the instant case the question is: Does the relevant parcel consist of the property as a whole or do the eight lots for which construction permits were denied constitute the relevant parcels? This has been referred to as the "denominator problem." *E.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994). State law may offer some guidance on how to define the relevant parcel, but, as the Court has noted, state law is not always determinative. *Compare Lucas*, 505 U.S. at 1017 n.7 (suggesting that one may look to the influence of the State's property law—whether and to what extent the State has recognized and extended legal recognition to the particular interest alleged to have been deprived of all economic value—on the claimant's reasonable expectations), *with Keystone Bituminous Coal Ass'n*, 480 U.S. at 500 (refusing to treat the support estate as a separate parcel of property simply because Pennsylvania law recognizes it as such and noting that "our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights").

C. *The Relevant Parcel*

The definition of the relevant parcel profoundly influences the outcome of a takings analysis. Above all, the parcel should be functionally coherent. In other words, more should unite the property than common ownership by the claimant. Thus, a court must also consider how both the property-owner and the government treat (and have treated) the property.

The District Court used several factors to determine the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. *See District Intown*, 23 F. Supp. 2d at 35

(citing *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991)). An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases. *See Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir.) (stressing the owner's treatment of property as a unit from the time of purchase), *cert. denied sub nom. RCK Properties v. United States*, 120 S. Ct. 373 (1999); *K & K Constr. Co. v. Department of Natural Resources*, 575 N.W.2d 531, 537 (Mich.) (stressing contiguity, unity of ownership, and a common development plan), *cert. denied*, 119 S. Ct. 60 (1998).

Applying these factors, the District Court correctly determined that all nine lots should be treated as one parcel for the purpose of the court's takings analysis. The lots are spatially and functionally contiguous. District Intown purchased the property as a whole in 1961 and treated it as a single indivisible property for more than 25 years. District Intown presented no evidence that, even after subdivision, it treated the lawn lots separately from Lot 106, the lot that contains the apartment building, for the purposes of accounting or management. The intentional act of subdivision is the only evidence produced by District Intown that it has treated the lots as distinct units. In fact, before the Mayor's agent, District Intown did not come forward with evidence showing that it had, for accounting purposes, treated the lawn maintenance fees separately from expenses associated with maintaining the apartment building. *See* Decision & Order of Mayor's Agent ¶ 40, *reprinted in* J.A. 364. While there is a dispute as to whether the adjacent landscaped lawn increases the apartment building's value, this is immaterial. Even if Lot 106 were deemed to have the same value with or without Lots 107 through 114, the application of the other three factors strongly suggests that Lots 106 through 114 are functionally part of the same property.

Appellants argue that the District Court was wrong to treat all the lots as a single parcel because it contradicts *Lucas* and

two Federal Circuit cases. This argument falls flat. District Intown first argues that the *Lucas* Court termed "extreme" and "unsupportable" a similar decision by the state court in *Penn Central* to treat multiple holdings as a single parcel for takings analysis. *See* Brief for Appellants at 15-16. This dictum, *see Lucas*, 505 U.S. at 1017 n.7, referred, however, only to the state court's decision to treat all of Penn Central's holdings *in the vicinity of Grand Central Station* as part of the denominator for the purposes of deciding whether plaintiffs could receive a reasonable return on their investment in Grand Central. *See Penn Central Transp. Co. v. New York*, 366 N.E.2d 1271, 1278 (N.Y. 1977). The *Penn Central* Court had no need to address this holding. The *Lucas* dictum casts aspersions on the state court's elevation of one factor, unity of ownership, over other factors in determining the relevant parcel. The District Court engaged in no such "extreme" conduct here; it did not look to all of District Intown's holdings in the vicinity of Cathedral Mansions South to evaluate the economic effect of the regulation at issue here; it looked to contiguous property that was purchased and treated as a single unit by appellants.

Similarly, the two Federal Circuit cases cited by District Intown do not undermine the District Court's definition of the relevant parcel. *See* Brief for Appellants at 16 (citing *Loveladies Harbor*, 28 F.3d at 1171 and *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986)). Neither of these cases support appellants' position and, in fact, *Loveladies Harbor* supports the District Court's decision. In *Florida Rock Industries*, the court reviewed the Army Corps of Engineers' uncompensated rejection of the plaintiff's application to mine limestone on 98 acres of the plaintiff's wetland property. *See Florida Rock Indus.*, 791 F.2d at 896. The Federal Circuit affirmed the trial court's decision to consider the 98 acres as the relevant parcel separate from the adjacent 1,462 acres of wetland. *See id.* at 904. The Federal Circuit's justification for this decision, however, was that all

the evidence and the findings indicated that the Army Corps of Engineers would have rejected mining on all of the property, so there was no point to including all 1,560 acres in the relevant parcel. *See id.* at 904-05. Thus, *Florida Rock Industries* is not analogous to the instant case; there is no indication that the District of Columbia will prevent District Intown from continuing to use its property to obtain income from its apartment building.

Loveladies Harbor lends support to the District Court's decision to treat Lots 106-114 as one parcel. The plaintiff in *Loveladies Harbor* sought to develop a total of 12.5 acres of land, consisting of 11.5 acres of wetlands and one acre of filled upland. *See Loveladies Harbor*, 28 F.3d at 1180. The Army Corps of Engineers refused to grant the permit required to fill the wetlands acreage. *See id.* at 1174. In reviewing whether this denial constituted a taking the Federal Circuit found that the trial court correctly concluded that the relevant parcel was the entire 12.5 acres, not just the 11.5 acres to which the permit denial applied. *See id.* at 1181. Thus, *Loveladies Harbor* argues against treating the property burdened by the regulation separately from contiguous property.

Moreover, the *Loveladies Harbor* Court emphasized that a "flexible approach, designed to account for factual nuances," guides its analysis of the denominator problem. *Id.* These factual nuances include "whether there remained substantial economically viable uses for plaintiff's property after the regulatory imposition," *id.* (citing *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981)), and "the timing of transfers in light of the developing regulatory environment." *Id.* Both of these factors support our conclusion in the instant case that Cathedral Mansions South as a whole constitutes the relevant parcel.

Finally, *Penn Central* is instructive where, as here, appellants own a single piece of property that is divisible into

several legally recognized entities. Indeed, the Court was rather blunt in saying that

> "[t]aking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.

Penn Central Transp. Co., 438 U.S. at 130. The Court also made it clear that a party may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest they heretofore had believed was available for development." *Id.* The Court found this suggestion to be "simply untenable." *Id.*

On the basis of the foregoing authority, it seems clear here that we must analyze District Intown's property not as separate, potentially divisible and transferable parcels, but as one contiguous parcel. Appellants note that the District of Columbia has taxed Lots 107 through 114 at a higher rate since subdivision, reflecting the District of Columbia's assessment that these lots are vacant developable land. They contend that it is inconsistent for the District of Columbia to speak from both sides of its mouth in this regard, claiming for tax purposes that the lots are developable, but refusing to permit development on the lots. We simply note that appellants retain the right to recombine the parcels and treat them as one property for the purposes of taxation, so no further disadvantage will befall them on this score.

We are perplexed by our concurring colleague's criticism of our approach to evaluating a takings claim. As the concurring opinion correctly notes, at bottom, the approach that we follow and the result that we reach are in accord with Supreme Court case law. Unless and until the Court instructs otherwise, we are obliged to judge within the bounds of established precedent.

D. *Analysis Under* Lucas

Given that Lots 106 through 114 should be treated as a single parcel, the District Court's denial of summary judgment on District Intown's *Lucas* claim is unremarkable. To come within *Lucas*, a claimant must show that its property is rendered "valueless" by a regulation. *Lucas*, 505 U.S. at 1009. District Intown presented no evidence to show that the regulation deprived the property as a whole of all economically beneficial use.

Even were we to view Lot 106 as distinct from Lots 107 through 114, it seems plain that the District Court should have granted appellees' motion for summary judgment. Drawing all inferences in favor of District Intown, the record does not support the conclusion that Lots 107 through 114 are rendered "valueless" by the regulation at issue. The record contains a finding by the Mayor's agent that any construction that destroyed the lawn would be incompatible with the lawn's status as a historic landmark. *See* Decision & Order of Mayor's Agent ¶ 61 n.1, *reprinted in* J.A. 368. District Intown argues from this that its case fell on all fours within *Lucas*. District Intown seeks to extend *Lucas* beyond its reach. The *Lucas* Court consciously recognized that it was drawing an arbitrary line between total destruction of economic value and something marginally less than total destruction. *See* 505 U.S. at 1019 n.8 (pointing out that while the line establishing a categorical deprivation as requiring a complete diminution in value is arbitrary as it relates to someone who only suffers a 95% deprivation in value, the person whose deprivation is "one step short of complete" may still seek compensation under the *Penn Central* balancing test). District Intown propounded no evidence that the lawns' economic value was totally destroyed as is required by *Lucas*, nor did District Intown offer evidence of the plots' fair market value after its construction permits were denied. *Cf. Florida Rock Indus.*, 791 F.2d at 905 (reversing the trial court's finding that denial of permit

constituted an uncompensated taking because the court failed to consider the property's fair market value after regulation).

The concurring opinion misconstrues the opinion for the court when it suggests that, pursuant to our analysis, no compensable taking could ever be found. As noted in the foregoing discussion, we simply intend to highlight the limited nature of the *Lucas* inquiry, and note that there would be no "categorical" taking even were we to view the parcels as separate under *Lucas*. We do not pass on how the parcels would fare separately under *Penn Central*'s *ad hoc* analysis.

E. *Analysis under* Penn Central

There are three main factors to be considered in *Penn Central*'s *ad hoc* inquiry: the character of the government action, the regulation's economic effect on the claimant, and the effect on investment-backed expectations. District Intown does not appear to argue that the character of the governmental action counsels finding a taking; this is not a permanent invasion, but rather a general regulation with a legitimate public purpose. As to the economic effects, District Intown offered no evidence that this regulation rendered Lots 106-114 unprofitable to maintain; there is nothing in the record to suggest that the apartment building does not bring in a sufficient return for District Intown, and a claimant must put forth striking evidence of economic effects to prevail even under the *ad hoc* inquiry. *See Penn Central Transp. Co.*, 438 U.S. at 131 (reviewing the Court's decisions upholding regulations despite diminution in a property's value of more than 75%).

Finally, District Intown did not present sufficient evidence that it had a reasonable investment-backed expectation to develop the lawns into apartment buildings. Here, as in *Penn Central*, the regulation does not interfere with District Intown's "primary expectation" concerning the use of the parcel, because it "not only permits but contemplates that appellants may continue to use the property precisely as it

has been used" for the past 28 years. *Penn Central Transp. Co.*, 438 U.S. at 136.

District Intown suggested at oral argument that it has satisfied the requirement of demonstrating reasonable investment-backed expectations because it purchased property that, at the time of purchase, was subdividable. This is not sufficient to establish the existence of reasonable investment-backed expectations. In this case, where the development District Intown proposes departs from the property's traditional use, and the moment of purchase is so attenuated from the moment of subdivision, the claimant surely must point to some action beyond mere purchase to establish the reasonableness of its expectations.

Appellants also argue that their expectations of the property's use between the moment of purchase and the moment of subdivision could have reasonably changed. This may be, but when appellants subdivided they surely knew that the legal regime had changed since they first bought their property. Moreover, they knew that any subdivided parcel would be subject to that regime. *Lucas* teaches that a buyer's reasonable expectations must be put in the context of the underlying regulatory regime. *See* 505 U.S. at 1030 (stating that the Takings Clause does not require compensation when the restriction is proscribed by background state law rules or understandings). District Intown purchased and subdivided its property subject to an existing regulatory regime that establishes that District Intown could have had no reasonable expectations of development at the time it made its investments.

At the time of purchase, District Intown could have reasonably expected the Shipstead-Luce Act to affect its rights of development. For approximately 60 years, the Shipstead-Luce Act has restricted development on properties that, like Cathedral Mansions South, abut or border upon the National Zoo. *See* D.C. Code Ann. § 5-410. Were that not sufficient,

after 1979, D.C.'s historic landmark laws additionally limited expectations of development. *See id.* § 5-1001 *et seq.* Thus, at the time District Intown subdivided the property, it knew, or should have known, that the property was potentially subject to regulation under the landmark laws. *Cf.* Amicus Curiae Brief at 15 (pointing out that almost the entire length of Connecticut Avenue from M Street to almost a mile north of District Intown's property is either landmarked or within a historic district). Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends. *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993). In this case, District Intown was in the real estate business, with a history of restriction of development for the purpose of preserving historic sites. Similarly, the Supreme Court rejected a company's claim of reasonable expectations that the Environmental Protection Agency would maintain trade secret confidentiality where the industry had long "been the focus of great public concern and significant government regulation" and the "possibility was substantial that the Federal Government . . . would find disclosure [of trade secrets] to be in the public interest." *Monsanto Co.*, 467 U.S. at 1008-09. Prior to and after subdivision, this particular property was the subject of increasing public activity devoted to restricting development through landmark designation. *See Good v. United States*, 189 F.3d 1355, 1361-63 (Fed. Cir. 1999) (finding the claimant had no reasonable expectations where he purchased the land subject to environmental regulation and watched as public concern for the environment increased and the applicable regulations became more stringent before seeking approval for development).

District Intown also argues that the District Court's finding that the regulation did not have a significant economic impact was erroneous. District Intown bases this argument on the assertion that they presented undisputed evidence that

the lawns, absent development, add nothing to the value of the apartment building. *See* Brief for Appellants at 24-25. This argument misunderstands the substantial burden District Intown faced in District Court. District Intown had to produce evidence showing that its entire property, including Lot 106, no longer provided a reasonable rate of return given the D.C. regulation. Whether the lawns add value to the apartment building is irrelevant to whether the property as a whole can be operated at a sufficient profit even with the regulation. In short, none of the *Penn Central* factors support District Intown's claim of a compensable deprivation of property.

III. CONCLUSION

For the reasons stated above, we affirm the District Court's grant of summary judgment in favor of the District of Columbia.

So ordered.

WILLIAMS, *Circuit Judge*, concurring in the judgment: The District of Columbia's Historic Preservation Board imposed historic landmark status not only on an apartment building named Cathedral Mansions South but also on a substantial stretch of adjacent lawn bordering the sidewalks of Connecticut Avenue. District Intown, the owner of both, claims that as applied to the lawn the landmarking effects a taking of its property in violation of the Takings Clause of the Fifth Amendment. The majority's disposition is—with one important exception—in general accord with the current opinions of the Supreme Court. Those decisions are of course binding. At the same time, however, it is not inappropriate to identify ways in which the prevailing analysis elevates formal concepts over economic reality and tends to strip the Clause of its potential for fulfilling the framers' likely purposes.

The economist's justification for the Takings Clause is that it provides a check on government's likely tendency to waste resources by treating private property as a free good. See Richard A. Posner, Economic Analysis of Law 58 (4th ed. 1992) ("The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power."). This is just an application of the general principle that if a firm can externalize costs (e.g., the health costs of polluting the air), it will use more of the unpriced resource (in this example, air as a waste sink) than it would if required to pay. And it will tend to overproduce the goods or services whose production uses the superficially "free" good—i.e., it will produce them at a level where the true value of the extra inputs exceeds the true value of the extra output. See generally Robert Cooter & Thomas Ulen, Law and Economics 45-46 (1988). As applied to government regulation, similar oversupply can be expected—here, production of regulations that impose more costs than they afford benefits, that do more harm than good.

The framers, though not articulating the purpose of the Clause in economic terms, evidently did view it as aimed at correcting the incentives of the political branches. There is evidence, for example, that James Madison saw electoral power slipping into the hands of a non-landholding majority, which in a "leveling" mode could be expected to invade landowners' rights. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 849 (1995). Late twentieth century America, of course, displays a far greater range of purposes than "leveling" for reallocation of rights. While the resulting proposals are naturally advanced in the name of the public good, many are surely driven by interest-group purposes, commonly known as "rent-seeking." Among these proposals, at least some inflict aggregate costs considerably outweighing their aggregate benefits, paralleling the wasteful production associated with private firms'

externalization of costs. The Takings Clause serves to curb such inefficiencies. See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 281 (1985) ("[T]he Takings Clause is designed to control rent seeking and political faction. It is those practices, and only those practices, that it reaches.").

A Takings Clause construction that was dedicated *without qualification* to preventing such government externalization would require compensation whenever regulation reduced the value of anyone's property, however slightly. Balanced against that goal is an array of considerations. Most obvious is the cost of calculating and administering compensation, which would tend to sink many a beneficent statute. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). (The compensation cost itself would be only a weak countervailing factor, for most beneficent regulation would presumably generate gains large enough to pay the losers if identification and calculation were costless.) My goal here is not to pinpoint the appropriate balance between these competing considerations, much less to suggest that the correct reading is one under which all regulation materially adversely affecting a property's value would be compensable. Rather, it is simply to note the ways in which modern interpretation of the Takings Clause, as exemplified in today's decision, impairs its role as a disincentive to wasteful government activities.

* * *

The majority applies an apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis. This presumption tends to reduce the likelihood that courts will order compensation. The larger the parcel, the greater the chance

that the regulated land will retain an economically viable use. Where no such use remains, there is a "total taking" and the government can "resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with," *Lucas*, 505 U.S. at 1027; where an economically viable use survives regulation, the best the owner can hope for is "partial" takings analysis. Under the latter courts will determine whether to award compensation by looking to "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action," *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); see also *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2146 (1998); *Lucas*, 505 U.S. at 1019 n.8, and will generally deny compensation so long as the restriction "substantially advance[s] legitimate state interests," *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); see also *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Few regulations will flunk this nearly vacuous test. In fact, the Supreme Court has only once found a partial taking to be compensable, and even then only a plurality applied the partial takings analysis. *See Eastern Enters.*, 118 S. Ct. at 2149; see also *id.* at 2154-60 (Kennedy, J.) (rejecting the plurality's takings analysis and finding invalidity on other grounds).

The Supreme Court has offered several justifications for this distinction between partial and total takings. See, e.g., *Lucas*, 505 U.S. at 1017-18 (suggesting that "from the landowner's perspective," a total taking is tantamount to a physical taking, and that from the government's perspective the concern that an obligation to compensate for any incidental value diminution would impede effective functioning cannot apply in the "relatively rare situations" of total takings). From the perspective of ensuring that the government not engage in wasteful behavior, however, the focus on the uses of the land that *remain* is misplaced: "[W]hat is

decisive is that which is taken, not that which is retained." Epstein, Takings, *supra*, at 58. Whether the landowner is left with a limited use of the land or none at all is hardly relevant to that issue. And as the regulating government delineates the scope of regulation, the opportunity for strategic behavior is obvious.

The majority's cursory application of the *Penn Central* factors further broadens the gap between the two modes of analysis, reinforcing the seemingly predetermined conclusion: in partial takings cases, the government wins. The majority states that District Intown has not shown the land "unprofitable to maintain," Maj. Op. at 14; it is unimaginable, however, absent an extraordinary tax liability, that a parcel could retain an economically viable use yet have a net negative value. The majority goes on to say that District Intown has failed to show that the land does not "bring in a sufficient return," *id.*, but does not answer the all-important question: a return on what? on out-of-pocket costs? on initial purchase price? on fair market value? Moreover, the majority provides no guidance as to how "sufficient" the return must be, except to cite *Penn Central*, in which the Court found that a 75% diminution in value did not constitute a compensable taking. See *id.*

Similarly, in its consideration of District Intown's "reasonable investment-backed expectations," the majority's analysis begs the question whether any landowner, in a world where zoning regulations are prevalent, could ever argue that a particular regulation was "unexpected." The presumption is insurmountable: "Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative needs." Maj. Op. at 15. Although the 1931 Shipstead-Luce Act might have put District Intown on notice that some regulation of architectural design might be expected, it is farfetched to conclude that District Intown, merely because of its proximity to the zoo, should reasonably

have anticipated an absolute ban on construction; the city's counsel, under questioning at oral argument, failed to identify any uses, or even attempted uses, of the Shipstead-Luce Act to support a complete construction veto. Although the Takings Clause is meant to curb inefficient takings, such a notion of "reasonable investment-backed expectations" strips it of any constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation.

Although the presumption in favor of looking at the parcel as a whole, and in turn the increased reliance on the partial takings mode of analysis, is at odds with the underlying principle of the Takings Clause, it is perhaps the best construction of the Supreme Court's limited guidance. The Court has never squarely addressed the question of how courts should define the relevant geographic parcel of land, also known as "horizontal severance." Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 705 (1996). In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court considered whether the city council had effectuated a taking of plaintiff's land by zoning as "residential" a 100-foot strip on plaintiff's 140,000 square foot parcel. Although the Court appeared to treat the relevant parcel as encompassing only the fractional strip, this was in no respect relevant to the Court's decision. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Court applied a very weak form of horizontal severance, focusing exclusively on the landmarked building itself without treating the owner's neighboring—but not adjacent—property as part of the greater parcel, as had the New York Court of Appeals. *See Penn Central Transportation Co. v. New York City*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977). But *Penn Central* tells little, as the properties were not all contiguous, had been put to different uses, and had

never been treated as a unified whole by the owners or the City.

Penn Central's handling of "vertical severance," however, is informative, if only by analogy. Using language seemingly broad enough to encompass horizontal severance, the Court made clear that it would not consider the air rights above Grand Central separately from the land rights: " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496-502 (1987) (refusing to regard either coal that statute required miners to leave in place (about 2% of total coal), or the "support estate," as distinct property for ascertaining whether statute denied owners all economically viable uses).

The Court has expressed similar reluctance to engage in "conceptual severance" more generally (i.e., the treatment of any specific property right as a single unit). In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court refused to treat extinction of the right to sell any part of a lawfully killed bald eagle as a total taking. *See id.* at 65-66 ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). The Court arguably evidenced a retreat from this strong position in *Hodel v. Irving*, 481 U.S. 704, 717-18 (1987), in which it found a taking in legislation that "completely abolished" certain landowners' rights to dispose of their property by descent or devise, even though they retained complete rights to possess and to make inter vivos transfers. The Court has not, however, reached agreement on the scope of this retreat. Compare *id.* at 719 (Scalia, J., concurring) (saying the decision "effectively limits *Allard* to its facts"), with *id.* at 718 (Brennan, J., concurring) (saying that the case was "unusual" and thus had no impact on *Allard*). Overall, I think the

majority is correct in its implicit understanding that the Supreme Court is reluctant to carve a landowner's parcel into smaller units for which compensation might be more likely.

But the factors that the majority applies in making the decision, drawn from decisions of the Federal Circuit and Claims Court and characterized by the majority as "eminently sound," Maj. Op. at 9, strike me as uninformative and largely irrelevant. The factors considered are: (1) whether the neighboring parcels are contiguous, (2) whether they were acquired simultaneously, (3) whether they have been treated as a single unit, and (4) the extent to which the restricted lot benefits the neighboring lot. Maj. Op. at 8-9.

The first factor, contiguity, is clearly necessary but in no way sufficient. The next two factors—simultaneity of acquisition and unity of use—are more troublesome. Both elevate history—either the historical purchase or the historical use—over the real-world present relationship between the tracts. Compare Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. Land Use & Envtl. L. 381 (1993) (proposing that courts look to the "moment of regulation" when defining the relevant parcel). The majority's focus on the property's use prior to regulation tells us nothing about the value-producing opportunities foreclosed at the time of regulation. "It is, of course, irrelevant that [the government] interfered with or destroyed property rights that [plaintiff] had not yet physically used. The Fifth Amendment must be applied with 'reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, *or such as may be reasonably expected in the immediate future*.' " *Penn Central*, 438 U.S. at 143 n.6 (Rehnquist, J., dissenting, quoting *Boom v. Patterson*, 98 U.S. 403, 408 (1879)).

The majority mentions but brushes aside a fourth factor—the extent to which the regulated parcel benefits the neigh-

boring lot. Maj. Op. at 9. Yet this appears the most relevant. The more a burdened tract in its regulated use benefits contiguous property, the less likely that the regulation has a net negative impact. In the extreme case a property interest may be worthless except in conjunction with another. Thus in *Keystone Bituminous Coal Ass'n*, the Court pointed out that the "support estate" had "value only insofar as it protects or enhances the value of the estate with which it is associated [i.e., the mineral estate]," 480 U.S. at 501, and therefore refused to treat the "support estate" as a separate interest at all. Similarly, small parcels of land, either in the interior or around the edges of greater parcels, commonly are valuable only when they combine with the greater parcel to create a more valuable whole; for regulation of the exterior (such as setback requirements), then, it makes sense to measure the impact in conjunction with the "primary" parcel. Looking to the property owner's benefit from these internal synergies parallels use of "average reciprocity of advantage," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), which considers the benefit that each burdened owner—as in ordinary zoning or historic districting—receives from the similar restriction of his neighbors.

Of course there will be some synergy between almost any two neighboring parcels under common ownership, since unified ownership creates options for the sole owner that multiple landowners could achieve only by contracting. But synergy is a matter of degree, and mere contiguity should not be enough. One commentator proposes a rather demanding synergy test, arguing that the regulated tract should be considered as its own parcel so long as not all of its value derives from synergies with neighboring land; in such cases, the parcel would have an independent economically viable use, which if destroyed by regulation would be compensable under *Lucas*. See John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L.

Rev. 1535, 1557-58 (1994). One need not go so far to see the skimpiness of the synergy here.

To be sure, Cathedral Mansions is more than several contiguous parcels. According to the decision of the Historic Preservation Review Board, "The buildings are sited imaginatively to provide the greatest possible integration of living space with well-landscaped open space." Joint Appendix ("J.A.") 320. (Passersby who observe the rather bare lawn will have to reach their own judgments on the adjective "well-landscaped.") Integration there doubtless is—almost any lawn around a building will manifest a degree of integration. But there is no explicit showing that these synergies depend on the *entire* lawn remaining undeveloped. The proposed townhouses would cover only the portion of the lawn abutting Connecticut Avenue, still leaving the interior portion, approximately half the lawn, undeveloped. Common sense would suggest that at some distance from the building marginal synergies created by extra lawn space become slight, and thus that the part of the lawn beyond that line should be treated as its own parcel for takings purposes. Further, although District rent-control law evidently allows the owner to earn a return on the tax-assessed value of land in a single tract with a rent-controlled building (here the owner could apparently recover that status by undoing the formalities of subdivision), that value is likely to be only a tiny fraction of the value absent the historic landmarking.

In fact, it may well be completely different synergies —ones between the lawn and adjacent Connecticut Avenue —that have driven the landmarking decision. The Board observed that the lawn "contributes significantly to the unique open space character of Connecticut Avenue." J.A. 320. A cynic might suspect that the alleged relationship between the lawn and the Cathedral Mansions apartments is little more than a cloak by which the citizens of Upper Northwest Washington have secured some parkland on the

cheap. Parks are good, but the Fifth Amendment says that taking them is not.

Of course, there is another synergy between the two parcels and adjacent Connecticut Avenue, namely the historical value that inheres in the preservation of a building as it was initially constructed (i.e., with an expansive lawn beside it). Uncompensated landmark preservation seems to rest on this synergy. The Court in *Penn Central* embraced the view that "the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole." 438 U.S. at 134. This broad language seems to redefine "reciprocity of advantage" in such a way that no government act could ever require compensation, as the afflicted owner would be a member of the taking polity and thus in receipt of offsetting advantages, artificially presumed to be adequate.

Apart from obliterating takings law, such a view has peculiarly perverse effects in the realm of historic preservation. Although such laws try to preserve for society the positive externalities created by buildings like Cathedral Mansions, inflicting the entire cost on the creator of the landmark (or his successor in interest) is bound to discourage investment in first-class design. Moreover, while insurance markets can achieve the risk-spreading (or anti-"demoralization") goals that some attribute to the Takings Clause, compare Posner, Economic Analysis of Law, *supra*, at 58, they cannot offset non-compensation's disincentive to good design. Historic landmark preservation, after all, is imposed selectively on those who went out of their way to secure architectural distinction. The higher the quality, the higher the premium for takings insurance; the disincentive is inescapable.

Having found that the lawn and apartment parcels should be treated as a unit, the majority nevertheless considers whether compensation would be due even if the lawn were analyzed separately; in doing so, it gratuitously takes an even

harsher stance against compensation than does present law. The majority finds that District Intown has failed to offer evidence that the regulation denies it "economically viable use of [the] land," *Lucas*, 505 U.S. at 1016, even though the Mayor's own agent found that "any construction that destroyed the lawn would be incompatible with the lawn's status as an historic landmark." Maj. Op. at 13. Thus, so long as the lawn is untouched, "economically viable" uses are permissible. It is hard to imagine what "economically viable" use that constraint leaves, unless the majority means that the very barest thread of value, yielded by some thoroughly bucolic use, is enough to defeat a total takings claim. By this standard, no regulation can ever effect a total taking, and at best will be tested only under the far weaker partial takings rubric.

* * *

The prevailing Federal Circuit-Claims Court method of defining the relevant parcel, followed by the panel here, focuses on marginal issues and largely overlooks the more critical concern of synergies; the focus on the landowner's historical, rather than proposed, use further skews the analysis. But the Supreme Court's general approach seems to militate in favor of looking to the parcel as a whole. Similarly, although resting uncompensated landmark preservation on the idea of reciprocal advantage stretches the concept into meaninglessness, and the denial of compensation discourages ex ante what it hopes to foster ex post, the current cases give these arguments little purchase. Accordingly, I concur in the majority's decision to affirm.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 96-569-LFO

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL.,
PLAINTIFFS,

v.

DISTRICT OF COLUMBIA, ET AL., DEFENDANTS

MEMORANDUM

Plaintiffs, a limited partnership and its partners, bring this action under 42 U.S.C. § 1983 on the ground that the District of Columbia has taken their property without just compensation. The undisputed facts are that in 1961 plaintiffs purchased in fee simple Lot 1 of Subdivision Square 2106 (hereinafter "Lot 1"). Known as Cathedral Mansions South, Lot 1 consisted of an apartment building and adjacent landscaped lawns. Cathedral Mansions South was built by local developer Harry Wardman in the early 1920s as part of his larger Cathedral Mansions project. Defendants assert, and plaintiffs do not contest, that Lot 1 was maintained by plaintiffs and their predecessors as a single taxable lot from 1922 until 1988. At that time, twenty-seven years after they purchased Lot 1, plaintiffs caused it to be subdivided and recorded as separate lots: Lot 106, which included the improvements on the original site, and eight smaller contiguous lots (Lots 107-114) carved out of the landscaped lawn.

In December 1988, following the subdivision, plaintiffs applied for building permits to construct one single-family townhouse on each of Lots 107-114. On February 14, 1989, plaintiffs' applications were referred to the United States Commission of Fine Arts ("Commission"), as a portion of Cathedral Mansions South faces the Zoological Park, a

federal property protected by the Shipstead-Luce Act. *See* D.C. Code § 5-410 (1994) (effective May 16, 1930). The Commission ultimately recommended disapproval of the applications for reasons both practical and aesthetic. *See* Pls.' Mot. for Summ. J. Ex. B-4.

On March 2, 1989, while plaintiffs' permit applications were still pending, an application was filed with the District of Columbia Historic Preservation Review Board ("Board") to designate as an historic landmark the entire Cathedral Mansions complex, including Lots 106-114. Under D.C. Code § 5-1002(6)(B), properties for which historic landmark applications are pending are treated as landmarks for purposes of the Historic Landmark and Historic District Protection Act of 1978, D.C. Code § 5-1001 *et seq.* (the "Landmark Act"). Accordingly, on March 7, 1989, plaintiffs' applications were referred to the Board for review and recommendation.[1]

On May 17, 1989, the Board acted on the landmark application, voting to designate Cathedral Mansions, including Lots 106-114, as an Historic Landmark in the District of Columbia Inventory of Historic Sites. It described the complex as containing three Georgian Revival style buildings

> sited imaginatively to provide the greatest possible integration of living space with well-landscaped open space. Individual apartments were designed where possible to

---

[1] Plaintiffs repeatedly assert that "zoning approval" was obtained on March 7, 1989, the date on which their applications were forwarded to the Board. However, the transmittal letters to the Commission, Pls.' Mot. for Summ. J. Ex. B-2, indicate that "zoning approval" and "structural approval" were certified as early as February 15, 1989. Plaintiffs' emphasis to the contrary, it is not clear from their evidence that "zoning approval" of this type has any significance, apart from the fact that it is one of numerous considerations that determine whether a building permit will be issued.

> include multiple exposures with large areas of fenestration, sun rooms and French doors opening onto sheltered patios and balconies. Cathedral Mansions is designed in the context of Connecticut Avenue and nearby parkland including the National Zoo and the Rock Creek and Klingle Valley ravines. It contributes significantly to the unique open space character of Connecticut Avenue in which single family and multi-family residences complement each other and are integrated and enhanced through a continuity of designed and natural landscape.

Pls.' Mot. for Summ. J. Ex. B-5 at 1. In support of its landmark designation, the Board noted that Cathedral Mansions was "an early and fine example of a large apartment complex in a park-like setting" and a "notable work of Harry Wardman, one of the most prolific and influential developers of residential property in the history of the District of Columbia." *Id.* at 2.

In July 1989, the Board held a hearing on plaintiffs' building permit applications, and recommended that they be denied on grounds that the "construction of eight new townhouses on the open space is not consistent with the purposes of Section 2(b) of D.C. Law 2-144, Historic Landmark and Historic District Protection Act of 1978." Pls.' Mot. for Summ. J. Ex. A-12. Plaintiffs initially sought a hearing before the Mayors Agent to review the Board's decision; however, their permit applications were dismissed without prejudice by the Mayor's Agent in an "Uncontested" Decision and Order of December 20, 1991.

In January 1992, plaintiffs once again submitted applications for permits to build townhouses on Lots 107-114. Upon referral, the Board again denied plaintiffs' applications as inconsistent with the landmark status of Cathedral Mansions. On March 8, 1993, the Mayor's Agent affirmed the Board's decision, and signed an order denying plaintiffs' building permit applications, concluding that the proposed

construction was incompatible with the Cathedral Mansions landmark because it "would result in the destruction" of the lawn, which is "an integral part of the landmark."[2] Pls.' Mot. for Summ. J. Ex. B-1 at 12.

In the instant action, plaintiffs do not contest the decisions of the Board or the Mayor's Agent. Nor do they challenge the Historic Landmark and Historic District Protection Act itself. Rather, they assert pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that defendants have effected a "total taking" of their property—or more specifically, of Lots 107-114—for which they are entitled to just compensation. Defendants assert that no taking has occurred because plaintiffs failed to exhaust their administrative remedies and because they have not been deprived of all economic benefit from the property. Pending are cross-motions for summary judgment.

I.

Before a regulatory taking claim brought against a state entity is ripe for decision in federal court, the claimant must demonstrate that: (1) the responsible state agency has made a final decision as to "application of the [challenged] regulation to the property at issue"; and that (2) the claimant has "sought" compensation through available state procedures.

---

[2] On April 21, 1993, plaintiffs petitioned the District of Columbia Court of Appeals to vacate certain findings made by the Mayor's Agent. Plaintiffs conspicuously failed to challenge the actual denial of the applications or to demand the issuance of permits; accordingly, the Court of Appeals dismissed the complaint on grounds that plaintiffs had not created a justiciable case or controversy. *See District Intown Properties, Ltd. v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 680 A.2d 1373 (D.C. 1996). The Court of Appeals held, however, that findings of the Mayor's Agent concerning economic hardship were made *ultra vires*, thus voiding them of preclusive effect in any subsequent litigation.

See Suitum v. Tahoe Reg'l Planning Agency, 117 S.Ct. 1659, 1664-65 (1997); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). Defendants, in effect, contend that plaintiffs satisfied neither prerequisite because they "elected to by-pass" procedures that would have permitted the Mayor's Agent to consider plaintiffs' claims of economic hardship prior to issuing his final order. *See* Defs.' Mot. for Summ. J. at 12. Defendants' contention is not supported by governing District of Columbia law.

The Landmark Act contains separate provisions concerning applications for "Demolitions," "Subdivisions," "Alterations," and "New construction" within an historic district or on the site of an historic landmark; at issue here is which of the latter two categories properly described plaintiffs' applications. When they sought review by the Mayor's Agent, plaintiffs invoked the provision governing "New construction," which applies to permits "to construct a building or structure in ar historic district or on the site of an historic landmark." D.C. Code § 5-1007 (1994). Defendants argue that plaintiffs were equally entitled to invoke the procedures for "Alterations," D.C. Code § 5-1005, since construction of new townhouses on the landscaped lawn would inevitably "alter" the Cathedral Mansions historic landmark site.[3] Defs.' Reply at 4.

The distinction is more than semantic. Under D.C. Code § 5-1007, the Mayor's Agent was required to issue plaintiffs' building permits unless he found the proposed construction to be "incompatible" with the character of the landmark. Under D.C. Code § 5-1005, however, the Mayor's Agent could have issued the permits over the objections of the Board if he found the proposed alterations to be "necessary in

---

[3] While defendants' motion refers to lots 107-114 as the *site* of the Cathedral Mansions landmark, they were, in fact, designated as *part* of the landmark. *See* Pls.' Mot. for Summ. J. Ex. B-5.

the public interest," or if failure to issue the permits would result in "unreasonable economic hardship to the owner." The legislative history of the Landmark Act indicates that the "unreasonable economic hardship" test of § 5-1005 was "designed to embody the constitutional standard [for a taking] as defined by the United States Supreme Court." *See* Report of the Committee on Housing and Urban Development, Council of the District of Columbia, on Bill 2-367 (Law 2-144) (October 5, 1978) at 6, 11.[4]

The administrative record in this case reflects considerable confusion among the parties as to whether plaintiffs' project was better described as an "alteration" or "new construction," and as to the applicable standard of review in either case. These issues, however, need not be resolved here. While defendants argue that plaintiffs *could have elected* to characterize their project as an alteration, they do not argue that plaintiffs were *precluded* from characterizing it as "new construction" and proceeding in accordance with § 5-1007. In fact, when the issue was raised by plaintiffs' representative at the first Board hearing in 1989, the Board Chairman stated: "[I]t's our understanding that alterations pertain more to structure as opposed to the land, and so, the application is properly filed under new construction. So it didn't require that you request alteration or even demolition, for that matter." Historic Preservation Board Tr., 7/19/89, at 148-49.

---

[4] The Council Committee that reported the bill offered no explanation why the "unreasonable economic hardship" test was adopted for purposes of an alteration permit and not for purposes of a new construction permit; however, the report indicates that the test was explicitly developed to conform with the then-recent Supreme Court decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which involved an application for alteration of an historic landmark. *See* Report of the Committee on Housing and Urban Development, Council of the District of Columbia, on Bill 2-367 (Law 2-144) (October 5, 1978) at 6.

When plaintiffs were informed by defendants of the Board's second "do not issue" recommendation, that notification characterized plaintiffs' project as "New [c]onstruction." *See* Defs.' Reply Ex. C. Unsurprisingly, plaintiffs requested review by the Mayor's Agent pursuant to the regulations governing permits for new construction, rather than alteration. *See* Defs.' Reply Ex. B. Although plaintiffs were invited—but ultimately declined—to present evidence of "economic hardship" to the Mayor's Agent, as would have been appropriate in a proceeding under § 5-1005, *see* March 8, 1993 Decision & Order, Pls.' Mot. for Summ. J. Ex. B-1 at 12-13, this did not change the character of the proceeding, which was a review of a permit for new construction pursuant to § 5-1007. *See District Intown Properties, Ltd. v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373 (D.C. 1996). Once the Mayor's Agent issued his final order denying their permits, plaintiffs exhausted their administrative remedies under § 5-1007: "A developer who claims that the denial of a permit for new construction constitutes uncompensated taking of his property is free to bring an action against the District for damages, and thus has a readily available legal remedy." *Id.* at 1379.

Finally, even if plaintiffs had elected to proceed under § 5-1005, defendants have failed to demonstrate how that section would provide plaintiffs with a *remedy* for the denial of their building permits. Even if they successfully demonstrated "unreasonable economic hardship," § 5-1005 would merely authorize, but not require, the Mayor's Agent to issue the permits over the objections of the Board. *See* D.C. Code § 5-1005(f) ("no permit shall be issued unless the Mayor finds that such issuance is necessary in the public interest or that a failure to issue a permit will result in unreasonable economic hardship to the owner." And § 5-1005 provides no mechanism for compensating a property owner if the Mayor's

Agent declines to issue an alteration permit despite "unreasonable economic hardship."

For the reasons stated above, the record indicates that plaintiffs have exhausted all available avenues of administrative review, that a final decision has been issued, and that District law does not provide a procedure to compensate plaintiffs for denial of their building permit applications. Their claim that such denial amounts to an unconstitutional taking is thus ripe for review in this forum.

II.

Plaintiffs, relying on the Supreme Court's decision in *Lucas*, 505 U.S. 1003 (1992), claim that denial of their building permit applications constituted "a total taking" for which they are entitled to compensation. Pls.' Mot. for Summ. J. at 1. Defendants counter that a categorical taking has not been effected, as plaintiffs have "not been denied all beneficial use of [the] property." Defs.' Mot. for Summ. J. at 9. Rejecting the applicability of *Lucas*, defendants seek instead to locate this case within the balancing framework established by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). They argue that, pursuant to the *Penn Central* analysis, no taking has occurred because while plaintiffs have been denied the opportunity to develop the lawn of the Cathedral Mansions property, they continue to derive "economic value" from it. Defs.' Mot. for Summ. J. at 10.

A.

When reviewing a claim that government action has denied "an owner economically viable use of his land," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)), a court must determine whether it is to be analyzed through the prism of *Lucas*' categorical standard or *Penn Central*'s balancing inquiry. To do so, the court first has to identify the

relevant parcel of property—the "denominator" to be input into the takings calculus—so that it can assess whether the governmental deprivation has been total or partial. *See, e.g., Lucas*, 505 U.S. 1003, 1016-17 n.7; *see also Keystone*, 480 U.S. at 497.

Plaintiffs contend that the relevant parcel consists of Lots 107-114, namely those comprising the lawn of the Cathedral Mansions complex and those for which they filed the permit applications. Pls.' Opp./Reply at 3-5. If they are correct, denial of the permit applications arguably rendered the relevant property "valueless," such that compensation would be required. *Lucas*, 505 U.S. at 1007, 1029. Defendants, by contrast, argue that the denominator should be defined as "the Cathedral Mansions property as a whole," meaning all of the constituent parts that formed the original Lot 1 that plaintiffs purchased in 1961. Defs.' Mot. for Summ. J. at 10. According to their position, denial of the applications limits the uses to which the lawn can be put, but in so doing does not work an unreasonable diminution in value and thus does not require payment of compensation.

Undisputed facts and governing jurisprudential principles establish that defendants' argument must prevail. To begin with, the Supreme Court in *Penn Central* articulated the general rule that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. More specifically, the Court of Claims, experienced in taking matters, has held that in determining what constitutes the relevant parcel,

> [f]actors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus.

Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991); *see also K & K Constr., Inc. v. Department of Natural Resources*, 575 N.W.2d 531, 537 (Mich. 1998) (identifying factors of contiguity, unity of ownership, and proposed development scheme).

These factors make clear that the appropriate denominator in this case is the entirety of former Lot 1 purchased by plaintiffs in 1961. First, there is contiguity among all the subdivided lots of the formerly unified property. Second, plaintiffs bought all of Lot 1 at one time, and have owned it in its entirety since the date of acquisition. Third, the District of Columbia tax authorities assessed the land, including the site of the building, as a single parcel, with a separate item on the bill for improvements, from 1922 until 1988. Moreover, the Mayor's Agent found, and the D.C. Court of Appeals has related, that the Cathedral Mansions South building was designed and the site landscaped originally and since maintained (at least until 1988) as an integrated whole, with the building enhanced by the lawn "in order to create the illusion of a resort-like building in a park-like setting." *See District Intown Properties v. D.C. Dep't of Consumer and Regulatory Affairs*, 680 A.2d 1373, 1375 (D.C. 1996). All of these factors demonstrate that the relevant parcel is a singular lot consisting of the apartment building and the lawn.

Supporting this conclusion is the undisputed evidence concerning plaintiffs' "investment-backed expectations." *Penn Central*, 438 U.S. at 124. This factor, generally considered when a court is assessing whether a taking has occurred, *see id.*, also is important at the parcel definition stage because it sheds considerable light on the landowner's conception of how to identify the relevant property. In the instant case, it is undisputed that plaintiffs bought the entirety of Lot 1 in 1961, and maintained it as a single, unified lot until they sought to subdivide it in 1988. It was only during that period—plaintiffs trace it to "approximately" 1986, Pls.' Stmt. of Undisputed Facts ¶ 5, though no evidence indicates

that they made any expenditures before 1988[5]—that plaintiffs developed an expectation of development and began investing money toward that end. *Id.* While not conclusive in terms of parcel definition, plaintiffs' acknowledgment shows that for approximately one quarter-century—dating back to the point of acquisition—they thought of the Cathedral Mansions property as one unified parcel, not nine discreet lots; for at least twenty-five years, then, they had no investment-backed expectations that the singular parcel would be thought of or treated any other way. This, along with the factors discussed above, supports a finding that the appropriate denominator is the entire parcel formerly known as Lot 1.[6]

B.

In view of the foregoing, defendant is entitled to a summary judgment that no categorical taking has occurred here. Plaintiffs' property has not been rendered "valueless" by the District's denial of the permit applications, *Lucas*, 505 U.S. at 1007, and plaintiffs retain "economically viable use of [their] land." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 485 (citation omitted). Indeed, they retain ownership of and a beneficial interest in an apartment building that produces rental income and that possesses market value; they also own

---

[5] *See* Pls.' Stmt. of Undisputed Facts ¶¶ 4-12. The exhibits supporting Mr. Calomiris' declaration to this effect evidence no such expenditure before 1988. Pls.' Mot. for Summ. J. Ex. A.

[6] Plaintiffs concede that there is no authority for defining the relevant parcel based solely on how lots are recorded. Indeed, they admit that parcel definition incorporates factors other than just recorded lots, as they argue that "it is entirely appropriate for [the] Court to treat all of the [r]estricted [l]ots . . . as a 'larger parcel' . . . ." Pls.' Opp./Reply at 7. Obviously, if parcels corresponded solely to recorded lots, then plaintiffs' suggestion would be untenable.

the lawn of the complex, which contributes to the property's environment of "a resort-like building in a park-like setting." *District Intown Properties*, 680 A.2d at 1375.

These circumstances establish that the instant case is materially different from *Lucas*. There the beachfront land had no economically beneficial use to the landowner except as a site for a residence; the denial of a building permit required the landowner to leave the land "substantially in its natural state," which left it "without economic value." 505 U.S. at 1018, 1016 n.7. Leaving the land open and undeveloped might have served the public interest in preserving a fragile beachfront from erosion, but there was no suggestion that preservation would serve any economic interest of the landowner with respect to that parcel or any adjacent or related property. Here, by contrast, original Lot 1 is clearly not "substantially in its natural state." Furthermore, while denial of the construction permits promotes the public interest expressed through the Landmark Act, plaintiffs are able to continue to derive significant economic benefits from their property. The foregoing establishes as a matter of law that denial of plaintiffs' construction permit applications did not effect a categorical taking within the meaning of *Lucas*.

C.

This conclusion does not end the inquiry, however. Because denial of plaintiffs' applications arguably effected a partial, yet compensable taking, plaintiffs' claim must now be assessed through the case-specific framework fashioned by the Supreme Court in *Penn Central*. There the Court identified three factors to guide the inquiry: 1) the economic impact of the regulation on the claimant; 2) the regulation's interference with the owner's investment-backed expectations; and 3) the character of the governmental action. 438 U.S. at 124. These factors are addressed in reverse order.

1.

It is well-settled that "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citations omitted). As opposed, for example, to a regulation that authorizes a "permanent physical occupation of an owner's property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), the denial of plaintiffs' permit applications was non-physically intrusive, was part of a more general "public program," *Penn Central*, 438 U.S. at 124, and was aimed specifically at promoting the congressionally recognized public interest in preserving the open space opposite the National Zoo. *See* D.C. Code § 5-410 (1994); *see also* 438 U.S. at 125 (finding that regulation sought to promote the "common good" and "the health safety, morals, or general welfare"). By definition, a regulation of this variety is less likely to effect a compensable taking. *See, e.g., Keystone*, 480 U.S. at 485-93 (finding no taking because of, *inter alia*, the statute's "public purpose").

2.

Similarly, denial of the permit applications does not interfere unnecessarily with plaintiffs' investment-backed expectations. As alluded to above, plaintiffs maintained the property as one unified lot for roughly twenty-five years. Plaintiffs acknowledge that only in 1986—or, as the evidence suggests, 1988—did they begin to develop expectations of developing Lots 107-114 and begin investing money toward that end. Pls.' Stmt. of Undisputed Facts ¶ 5. The late development of plaintiffs' investment-backed expectations serves to distinguish this case from those in which the Supreme Court has found a taking as a result of interference with investment-backed expectations.

For example, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court found a taking when a property owner was prevented from mining coal under particular parcels of property. 260 U.S. at 415-16. Critical to the Court's analysis, as later reported in *Penn Central*, was that the claimant had sold the surface rights to the property, but had "expressly reserved the right to remove the coal thereunder," *Penn Central*, 438 U.S. at 127; the property owner's expectations thus could be traced to the original transaction. Similarly, in *Lucas* the Court underscored that the property owner acquired the two residential lots with the explicit "intention" and expectation of "erect[ing] single-family residences," *Lucas*, 505 U.S. at 1008; the specific investment-backed expectations that were held to have been frustrated therefore underlay the original transaction.

By contrast, it is undisputed that plaintiffs in this case lacked investment-backed expectations at the time they acquired the property in 1961, and that they did not develop them until shortly before they submitted their permit applications. There is no evidence, nor do plaintiffs claim, that their original purchase of Lot 1 was in any way motivated by expectations concerning development of the lawn. Moreover, there has been no suggestion that the nature of the original transaction was shaped by the existence of any such expectations. Denial of the permit applications therefore did not, under the principles established in *Pennsylvania Coal* and *Lucas*, work a compensable interference with plaintiffs' investment-backed expectations.

The gap between the instant case and *Pennsylvania Coal* and *Lucas* is ostensibly bridged by the common feature that regulatory action taken subsequent to the relevant property transaction frustrated each respective property owner's expectations of development. To the contrary, in *Pennsylvania Coal* and *Lucas* the regulatory action was unforeseen, as the respective legislatures enacted regulations that bore on the future use of the newly acquired property. In this case,

plaintiffs were on notice that their property was subject to designation as an historic landmark, and to the restricted uses that accompany such designation. Indeed, when, in the 1980s plaintiffs formed their investment-backed expectations, Congress had enacted, and the District government was administering, laws limiting the use of real property near a federal facility such as the National Zoo, *see* Shipstead-Luce Act, D.C. Code § 5-4101 (1994) (effective May 16, 1930), as well as property designated an historical landmark, *see* Historic Landmark and Historic District Protection Act of 1978, D.C. Code § 5-1002. There may be a dispute as to when plaintiffs knew about neighborhood efforts to designate the Cathedral Mansions property as an historic site, but this dispute is immaterial, as plaintiffs clearly recognized the property's distinguished provenance and knew, or should have known, of the pre-existing legal authority to designate it as an historic landmark—authority that ultimately was exercised. In view of the foregoing undisputed facts, no reasonable trier of fact could conclude that denial of plaintiffs' applications to build townhouses frustrated a reasonable expectation that they would be able to do so under well-established law and regulations.

Plaintiffs nonetheless argue that in 1988, before they sought the disputed permits, they subdivided the property into nine lots, and that the District of Columbia authorities zoned the property according to their subdivision proposal. This argument accords excessive import to the subdivision process. Even if plaintiffs had a legitimate expectation that they could subdivide former Lot 1, it does not follow in the circumstances here that they had a legitimate expectation that they could then build on the subdivided lots. Under District of Columbia law, subdivision and construction are subject to two vastly different regulatory processes; pursuant to the latter, public notice must be issued when building permits are submitted, D.C. Code § 5-1007 (1994), while under the former no such notice is required. This stark dichotomy

highlights that construction is a matter of heightened public concern. When coupled with the unique location of the Cathedral Mansions complex, and the fact that the *tout ensemble* is a treasured period piece of a famous architect, as a matter of law plaintiffs were not entitled to have a reasonable expectation that their permit applications would be granted. Furthermore, plaintiffs' "bootstrapping" of their own property from one to several lots without interrupting ownership places them in a less favorable posture than that enjoyed by an innocent purchaser of the newly subdivided lots. *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993).

3.

The final factor to be considered in the *Penn Central* analysis—the economic impact of the regulation—also supports a finding that no taking has occurred. It is well-settled that when governmental action "does not interfere in any way with the present uses" of the property, and when that action allows the owner "not only to profit from the [property] but also to obtain a reasonable return on its investment," there is an insufficient economic effect to warrant compensation. *Penn Central*, 438 U.S. at 136 (citations omitted). Here, denial of the permit applications "does not interfere with what must be regarded as [plaintiffs'] primary expectation concerning the use of the parcel"—as an apartment complex. *Penn Central*, 438 U.S. at 136. Plaintiffs continue to own and operate the apartment building, and they retain the landscaped lawn that, like the space above Grand Central Terminal, "provid[es] air, light, and views" to the apartments. Pls.' Mot. for Summ. J. Ex. B-1 at 2. Plaintiffs have not argued that the present arrangement does not yield a reasonable return, and they have not alleged disputed facts that such return has been diminished as a result of the denial of their permit applications.

Furthermore, plaintiffs do not dispute that the lawn effects architect Harry Wardman's plan of synergistic value created by the building and the lawn, a plan that the Historic Preservation Board concluded, with reason and without contradiction by plaintiffs, was achieved through a complex "sited imaginatively to provide the greatest possible integration of living space with well-landscaped open space." Pls.' Mot. for Summ. J. Ex. B-5 at 1. More specifically, plaintiffs have not alleged disputed facts to suggest that the lawn, in its present state, contributes no value to the relevant parcel of property. The only allegation they have made is that the lawn has no economic value *when divorced from the rest of the property*. Depos. of Harry A. Horstman, Pls.' Opp./ Reply Ex. 1-C at 136. But since it has been established that the proper denominator in the takings calculus is the entirety of former Lot 1, not current Lots 107-114, *see supra* Part II.A., a valuation of a hypothetically detached lawn is irrelevant. Plaintiffs have failed to proffer relevant evidence that the open space makes no significant contribution to the economic value of the complex as a whole. In these circumstances, and particularly in light of the Board's undisputed findings and conclusions, defendants had no responsibility to offer expert testimony to the contrary. Thus, while denial of the permits may prevent plaintiffs from maximizing the value of their property, it does not as a matter of law work such a significant diminution of value as to effect a compensable taking. *See Penn Central*, 438 U.S. at 137.

The three *Penn Central* factors considered, undisputed facts establish as a matter of law that defendants have not effected a compensable taking. Accordingly, an accompanying Order grants defendants' motion for summary judgment and denies that filed by plaintiffs.

DATE: September 25, 1998 /s/ LOUIS F. OBERDORFER
United States District Judge

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

March 2, 2000

Mr. E. Barrett Prettyman
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: District Intown Properties Limited
Partnership, et al.
v. District of Columbia, et al.
Application No. 99A704

Dear Mr. Prettyman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on March 2, 2000, extended the time to and including April 17, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ CLAYTON R. HIGGINS, JR.
Clayton R. Higgins, Jr.
Assistant Clerk